

Appl. No. 10/699,469
Atty. Docket No. 9081M
Response dated 6/08/2005
Reply to Office Action of 05/26/2005
Customer No. 27752

REMARKS

Claims 1-40 are now pending in the application.

APPLICANTS' ELECTION WITH TRAVERSE

The Office Action has required restriction to one of the following inventions under 35 U.S.C. 121:

- I. Claims 1-20 and 22-39.
- II. Claims 21 and 40.

In order to make an election in compliance with the M.P.E.P., Applicants provisionally elect the species in Group I, Claims 1-20 and 22-39. Applicants respectfully traverse this election requirement based on the following remarks.

The Applicants respectfully submit that the Examiner has not satisfied the various requirements in the MPEP in rendering a restriction requirement. According to §803 of the MPEP, two criteria must be met for a proper requirement of restriction:

- (A) The inventions must be independent or distinct, and
- (B) There must be a serious burden on the examiner if restriction is required.

MPEP § 803 (8th Ed. 2004.) Moreover, the MPEP requires that "Examiners must provide reasons and/or examples to support conclusions, but need not cite documents to support the requirement in most cases." MPEP § 803 (8th Ed. 2004.) Therefore, the Examiner is required to provide reasons and examples to support the conclusion that the inventions in present application are independent or distinct, and further must show how there is a serious burden on the Examiner.

The present Office Action concludes that Groups I and II are distinct from each other. However, the Examiner merely provides a conclusion that the inventions are distinct, the Examiner does not provide any reasoning as to how the inventions are distinct. Thus, the Applicant's respectfully submit that the Office Action fails to set forth the distinctness between Groups I and II.

Moreover, Claims 21 and 40 relate to methods of using the compositions in Claims 1 and Claims 2. Indeed, Claim 21 depends from Claim 1 and Claim 40 depends from Claim 2. Therefore, if Claim 1 and Claim 2 are allowable, then Claim 21 and 40 should be similarly allowable.

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Furthermore, even if an application contains inventions that are distinct, a proper restriction requires that there be a serious burden on the Examiner. (M.P.E.P. §803, 8th ed. 2004). As Section 803 of the MPEP explains

For purpose of the initial requirement, a serious burden on the examiner may be *prima facie* shown if the examiner shows by appropriate explanation either separate classification, separate status in the art, or a different field of search as defined in MPEP §808.02. That *prima facie* showing may be rebutted by appropriate showings or evidence by the applicant.

The present Office Action does not provide the appropriate reasoning to support a *prima facie* case that a serious burden exists. In fact, there is no discussion as to the extent of the burden on the Examiner to perform a search. Clearly, the fact that an art search was performed and an Office Action was issued for Claims 1-21 illustrates that there is no serious burden on the Examiner; given that Claim 1 is in Group I and Claim 21 is Group II. Since a serious burden on the Examiner has not been *prima facie* shown, the present restriction requirement is improper.

Based on the above remarks, reconsideration and withdrawal of the restriction requirement is respectfully requested. If upon reconsideration, this restriction requirement is made final, Applicants request the next Office Action contain Form Paragraph 8.05 as suggested in the §821.01 (8th ed. 2004), to shown that Applicants have traversed the requirement and have retained the right to petition from the requirement under 37 C.F. R. § 1.144.

APPLICANTS' AMENDMENT DATED MARCH 1, 2005

The present Office Action does not address the Applicants' Amendment and accompanying remarks submitted on March 1, 2005 in response to the previous Office Action. In order to avoid further delay in the prosecution of the present application, the Applicants request reconsideration of the application as soon as possible.

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CONCLUSION

Applicants have elected, with traverse, to prosecute the invention of Group I. The claims included in Group I are Claims 1-20, and 22-39. Applicants request reconsideration of restriction requirement, and allowance of all claims.

Respectfully submitted,

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